THE CASE FOR REPEALING THE CONGRESSIONAL REVIEW ACT

by
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A capstone project submitted to Johns Hopkins University in conformity with the requirements for the degree of Master of Arts in Public Management

Baltimore, Maryland
May, 2021

ABSTRACT

The Congressional Review Act (CRA) is often cited as a once-obscure law, but during the first four-and-a-half months of the 115th Congress, it was used to rescind fourteen administrative rules. Under the CRA, agencies are required to submit rules to Congress for review and, upon receipt, Congress has sixty legislative days to issue a joint resolution disapproving the rule. If the resolution is signed by the President, the rule is overturned. The lookback period is extended at the end of a legislative session. Trump's Office of Management and Budget expanded the CRA by interpreting it to apply to any agency guidance that had been approved since the law's inception in 1996 if that guidance had not been reviewed by Congress.

Repealing the CRA would address several problems created by the law including its impact on rulemaking efficiency, waste of federal resources created by revoking rules that were years in the making, and regulatory uncertainty. Most importantly, it would take away a quick and dirty means to strip American citizens of the environmental, health and safety, consumer, and workplace protections administrative rules are generally designed to provide. Finally, it would avoid the possibility that vetoed rules may not be replaced due to the CRA's prohibition on substantially similar rules.

The Sunset the CRA and Restore American Protections (SCRAP) Act was introduced in 2017 and could be re-introduced by the 117th Congress. The SCRAP Act is found to be a sound policy option with no fiscal burden, but it has the potential to create political friction both with Republicans who are committed to "Congressional oversight of the Administrative State" and Democrats who are eager to use the CRA to unwind

Trump-era rules. Democrats can use the CRA through the end of May 2021 and some resolutions have already been introduced. Democrats have other options to get rid of problematic rules from a prior administration. Ultimately, this analysis recommends the administration pursue a new SCRAP Act.

Advised by: Professor Paul Weinstein Jr.

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MEMORANDUM

TO: Shalanda Young, Deputy Director, Office of Management and Budget

FROM: Melissa Barbanell, Congressional Liaison

RE: Repeal of the Congressional Review Act

DATE: March 30, 2021

Action-Forcing Event:

Democratic members of the 117th Congress are considering using the Congressional Review Act (CRA) to reverse numerous midnight regulations, passed in the waning months of the Trump Administration.[1] Senator Brian Schatz (D-Hawaii) has stated that Congress must "coordinate very tightly with the Biden Administration."[2] Sources have identified over 1,400 rules and 200 significant rules that may be subject to review and revocation under the CRA review window.[3] Numerous entities are suggesting which rules should be the focus of such CRA review.[4]

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[1] Juliet Eilperin and Dino Grandoni. "In Trump's last days, a spree of environmental rollbacks." *The Washington Post*, January 15, 2021.
[2] Ibid.
[3] George Washington University, Columbian College of Arts & Sciences, Regulatory Studies Center, "Congressional Review Act," accessed January 30, 2021 https://regulatorystudies.columbian.gwu.edu/congressional-review-act. Sheila McCafferty Harvey, Elizabeth Vella Moeller, and Meghan Claire Hammond. The Return of the Congressional Review Act: With limited time to act, what regulations will the Biden administration target with the previously obscure CRA?" Pillsbury, Winthrop, Shaw, Pittman, LLP. Published January 19, 2021, https://www.pillsburylaw.com/en/news-and-insights/congressional-review-act-cra-biden.html
[4] Katelynn Bradley, Reese Goldsmith, Benjamin Saver, and Eric Waeckerlin. "It's Back: the Congressional Review Act and Implications for Recent Environmental Rules." Published January 26, 2021, https://www.jdsupra.com/legalnews/it-s-back-the-congressional-review-act-6025899/. Robert Mangas, and Steven G. Barringer "Will the New Congress Reverse Any 'Midnight Rules?'" Published January 15, 2021,

Statement of the Problem

Developing regulations is critical to addressing the problems we face as a country; it is a long multi-step process and the CRA provides a means to quickly dismantle the important and protective efforts of regulatory agencies with very limited deliberation while providing no solutions, offering no guidance to the agency for moving forward, and potentially foreclosing the possibility of replacing the regulations being disapproved.[5]

In brief, the CRA provides for disapproval of final agency rules within 60 days of continuous session after the rule has been submitted to Congress. It establishes a look-back period in the event that Congress adjourns prior to the running of 60 session days.[6] The CRA provides that multiple rules cannot be bundled under a single disapproval resolution, that a rule may only be disapproved in its entirety, and that such a rule "may not be reissued in substantially the same form."[7] Under, the CRA, "major rules" (i.e., those with a $100 million effect on the economy) take effect on the latest of 60 days after the date the rule is published in the Federal Register or received by Congress.[8]

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https://www.gtlaw.com/en/insights/2021/1/will-the-new-congress-reverse-any-midnight-rules. Cydney Posner. "Will the new Congress use the Congressional Review Act to nullify recent rulemakings?" Cooley LLC. Published January 13, 2021, https://cooleypubco.com/2021/01/13/new-congress-congressional-review-act/

[5] Congressional Review of Agency Rulemaking, 5 U.S.C. §§ 801-805 (1996). Associate General Contractors of America, *EPA's Rulemaking Process*, ("Federal regulations often take years to complete . . ."), accessed February 13, 2021 https://www.agc.org/sites/default/files/Galleries/enviro_members_file/EPA%20Rulemaking%20Process%20Handout.pdf.

[6] Daniel R. Perez. "Congressional Review Act Fact Sheet," (Washington, DC: Regulatory Studies Center, The George Washington University, 2019.)

[7] Ibid.

[8] Congressional Research Service, "The Congressional Review Act (CRA): Frequently asked Questions" by Maeve P. Carey and Christopher M. Davis (2020), 10.

I. AGENCY ACTION THROUGH REGULATIONS AND GUIDANCE SERVE A CRITICAL ROLE

Congress has created a vacuum due to hyper-partisan gridlock; it has failed to update laws or develop new laws to address the current issues facing the country.[9] Further, the laws Congress has passed leave gaps for regulatory agencies to fill – either due to a desire not to make controversial decisions or due to a lack of technical knowledge.[10] As the U.S. Supreme Court recognized in *Chevron v. NRDC,* "it is entirely appropriate for [an agency to resolve] the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency."[11]

Into this breach, agencies have been forced to leap. Given that the issues of the day must be addressed, executive agencies have acted by passing regulations and providing guidance. The current complete dysfunction in Congress has made it all the more important for agencies to act:

> in our current age of hyper-partisanship, few members [of Congress] care much for protecting the legislature's institutional prerogatives, and as a result it has become almost the expected norm for the executive branch to make the first move in addressing pressing problems through legally-strained interpretations of existing statutes rather than looking to any kind of iterated legislative process.[12]

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[9] Jody Freeman and David B. Spence. "Old Statutes, New Problems." *University of Pennsylvania Law Review* 162 (December 2014), 1-93.

[10] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865-66 (1984).

[11] Ibid.

[12] Philip Wallach, "The administrative state's legitimacy crisis," (Washington, DC: Center for Effective Public Management at Brookings, 2016) 10, accessed April 30, 2021 https://www.brookings.edu/wp-content/uploads/2016/07/Administrative-state-legitimacy-crisis_FINAL.pdf. See also, Matthew Oakes, Donald Verrilli, Richard Pierce, and Jody Freeman, "The Future of Administrative Law" *Environmental Law Reporter* 47 (March 2017), 10186 ("Congress does nothing and, as a result, the executive branch, feeling pressure to try to address the problems that confront the country, looks to existing statutory authority and tries to find ways, sometimes through creative readings of statutory authority, to identify sources of power to deal with the serious problems confronting the country. . . . It would be a lot better if Congress actually played the role it's supposed to play in our constitutional system. But given that it's not, it's unrealistic to think that an executive branch is going to sit on its hands rather than try to confront the problems of the country.")

Climate change is emblematic of Congress' failure to create new laws to address current problems. The Clean Air Act was reauthorized in 1990, long before the looming climate crisis was clear to American policymakers. The statute was not designed to address pollutants like carbon dioxide where the harm comes not from a single source but rather from the agglomeration of all of the sources across the globe. Nonetheless, in the absence of Congress passing appropriate laws that would put a price on carbon and thereby limit carbon emissions, executive agencies shoe-horned climate regulations into the Clean Air Act via regulation.[13]

II. Significant Resources are Expended to Develop Regulations Under Authorizing Statutes and Implementing Regulations Whereas Relatively Few Resources Are Expended to Disapprove Regulations under CRA

Significant time is committed to the development or regulations. Some examples of just how long the process can take include two of the "midnight" rules overturned using the CRA during the 115th Congress.[14] The Stream Protection Rule updated thirty-three-year-old regulations and was designed to prevent or minimize impacts to surface and ground water from coal mining. The development process began in 2009 and the

[13] David Doniger. "The Clean Air Act and Climate Change: Where We've Been and Where We're Going," (New York: Natural Resources Defense Council, 2014) ("in the second term, with a different Congress and no prospect of helpful legislation, President Obama stepped up to the challenge of tackling climate change under the clean air and energy laws already on the books. . . . The heart of the plan is using the Clean Air Act to put the first-ever national limits on carbon pollution from the fleet of existing power plants.)

[14] Thomas O. McGarity, Rena Steinzor, James Goodwin, and Katherine Tracy. "The Congressional Review Act: The Case for Repeal," (Washington, DC: Center for Progressive Reform, 2018) ("On average, the 15 rules that were eliminated through the CRA had been in the works for approximately three years each."). Stuart Shapiro. "Why does it take so long to issue a regulation?" *The Hill,* May 19, 2015 (citing cases of rulemakings taking upwards of 5-10 years while recognizing that thousands of non-controversial often take under a year to complete).

rule was finalized in December of 2016.[15] Similarly, the Securities and Exchange Commission (SEC) anti-corruption rule efforts began pursuant to a statute passed in 2010. The purpose of this rule was to increase the transparency of payments made by extractive industries in support of U.S. foreign policy interests. These regulations went through the regular process of notice-and-comment rulemaking and resulted in a rule which was finalized in 2012. This initial rule was vacated by the D.C. District Court in 2013.[16] The SEC went back to the drawing board to develop a rule that would comply with the requirements established by the court, and in September of 2016 finalized a revised final rule.[17]

Proponents of the CRA believe that its fast-track mechanisms are good policy. The resolutions may "short-circuit the congressional committee process."[18] CRA disapproval resolutions are not subject to the Senate filibuster, provide a means to force the resolution from committee after twenty days if thirty Senators petition, allow any Senator to make a non-debatable motion to proceed, disallow amendments and limit floor debate to ten hours.[19] "Similar expedited procedures were not enacted in the House of Representatives, although House committees may still be circumvented."[20]

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[15] U.S. Department of Interior, "Press Release: Interior Department Finalizes Stream Protection Rule to Safeguard Communities from Coal Mining Impacts," 2016, https://www.doi.gov/pressreleases/interior-department-finalizes-stream-protection-rule-safeguard-communities-coal-mining.
[16] *API v. SEC*, 953 F. Supp. 2d 5, 8 (2013).
[17] Securities and Exchange Commission, "17 CFR Parts 240 and 240b, Disclosure of Payments by Resource Extraction Issuers, Final rule. 2016," accessed February 15, 2021, https://www.sec.gov/rules/final/2016/34-78167.pdf.
[18] "The Mysteries of the Congressional Review Act." *Harvard Law Review,* 122. (June 2009), 2162, 2183.
[19] Daniel R. Perez, "Congressional Review Act Fact Sheet."
[20] "The Mysteries of the CRA." at 2168.

These fast-track provisions do allow Congress to act quickly. Whether this is good policy is debatable. This often means that a rule that has been authorized pursuant to a statute passed in the ordinary fashion (i.e., subject to filibuster, etc.) and which may have taken years in development can be overturned in a matter of weeks and without significant deliberation. The 115th Congress, in issuing its CRA disapprovals showed "scant concern for the policy merits" of their disapprovals; in fact, the Senators speaking in favor of resolutions frequently ceded back their time despite the CRA's limitation of Senate floor debate to ten hours.[21]

III. Regulations Provide Protection to Members of Society and the Environment and By Removing those Protections the CRA Endangers Americans.

Broadly speaking, agency rules provide safeguards and protect people and the environment.[22] The CRA creates a means to remove these protections. One needs only look at the rules that have been overturned with the CRA to see that these regulations were protective of American citizens and our environment. The use of the CRA to overturn these regulations harms those that would otherwise be protected.

Figure 1. Rules Rescinded Using the CRA

Rules Rescinded Using the CRA		
Rule	**Year CRA Disapproval Issued**	**Safeguards associated with regulation[23]**
Dept of Labor Ergonomics Rule	2001	Protected workers from musculoskeletal disorders associated with repetitive motion tasks in the workplace.

[21] McGarity et al. "The CRA: The Case for Repeal."

[22] It is important to recognize, however, that the rules proposed for CRA evaluation by the 117th Congress were largely anti-safeguard. Nonetheless, the vast majority of rules that are subject to the CRA are protective.

[23] Thomas O. McGarity, "The Congressional Review Act: A Damage Assessment." *The American Prospect*, Winter 2018.

Dept of Labor Injury Recordkeeping	2017	Protected worker safety by creating recordkeeping scheme that allowed OSHA to prosecute recordkeeping failures even if identified six months post-violation.
Dept of Labor Drug Testing	2017	Protected public safety by listing occupations for which drug test was allowed consistent with court opinions, e.g., aerospace, trucking, and law enforcement.
Dept of Labor Sub-State Government Retirement Savings Program	2017	Supported state regulations that created programs which automatically enroll employees in "auto-IRA" plans, DOL committed to not pre-empt such programs because they help employees save for retirement.
Multi-Agency[24] Fair Contractor	2017	Protected workers by incentivizing improved labor law performance by prospective contractors; made information on bidders' violations of labor law available to contracting agencies.
Securities and Exchange Commission Anti-Corruption	2017	Protected investors from impacts of corruption by ensuring that extractive industries operating abroad would report payments greater than $100k.
Social Security Admin Gun Purchase Background Check	2017	Protected the public by requiring SSA staff to submit information to National Instant Criminal Background Check System on recipients who could not possess guns due to mental disorders.
Federal Communications Commission Internet Privacy	2017	Protected internet users by requiring internet service providers to provide "reasonable security data" to prevent hacking and by requiring user consent before selling sensitive information.
Health and Human Services Women's Access to Family Planning Healthcare Services	2017	Protected low-income women who use health care services of Planned Parenthood by preventing states from considering whether recipient organization performed abortions in distribution of Title X funds. Title X funds can't be used for abortions; providers perform other potentially life-saving tests.
Dept of Education State Accountability	2017	Protected students by requiring DOE to promulgate timelines for ensuring that state accountability plans be equitable and address the needs of low-income and minority students.

[24] Agencies included: Department of Defense, General Services Administration and National Aeronautics and Space Administration. See Maeve P. Carey, "The CRA: FAQs," at 25.

Dept of Education Teacher Preparation	2017	Protected students by improving the quality of teacher preparation programs at schools receiving federal grants.
Dept of Interior Stream Protection	2017	Protected community water users and biodiversity by requiring surface coal mining operations to monitor streams and groundwater before and during operations, requiring overburden to be 100 feet from streams, and requiring mine reclamation.
Dept of Interior Land Use Planning	2017	Protected biodiversity by requiring land-use plans to be completed at landscape level and provided for public input in land use plan development.
Dept of Interior Alaska Predator Protection	2017	Protected biodiversity and ecosystems more broadly in Alaska National Wildlife Refuge by disallowing unsportsmanlike killing of predators. Intended to maintain sustainable populations of predator and prey.
Consumer Finance Protection Bureau (CFPB) Forced Arbitration	2017	Protected citizens' right to jury trial by prohibiting financial services companies from using forced arbitration clauses and allowed customers to bring class-action lawsuits against financial institutions.
CFPB Indirect Auto Lending & Compliance with Equal Credit Opportunity Act	2018	Protected minorities by requiring that indirect auto lenders ensure compliance with anti-discrimination principles of Equal Credit Opportunity Act.

IV. BECAUSE THE CRA ONLY ALLOWS FOR GENERIC DISAPPROVAL AND NO NEW RULES THAT ARE SUBSTANTIALLY THE SAME, AGENCIES MAY FACE SIGNIFICANT CHALLENGES DEVELOPING REGULATIONS TO ADDRESS THE MOST PRESSING ISSUES.

The CRA is a blunt instrument which "can be used only to invalidate an agency final rule in its entirety. It cannot be used to modify or restructure a rule in order to make it acceptable to Congress."[25] The statute specifies the precise language that Congress must use in a disapproval resolution: "The Congress disapproves the rule submitted by the ____ relating to ___ and such rule shall have no force or effect."[26] There is no

[25] Congressional Research Service, "The CRA: FAQs," at 5.
[26] 5 U.S.C. § 802(a).

opportunity to expand on this language or provide additional guidance as to the specific offending portion of the rule.

Coupled with the lack of specificity available under the CRA, the fact that CRA disapproval resolutions do more than simply unwind the targeted regulations but also may bind future agency action is perhaps the most damning feature of the law. The CRA provides that an agency may not reissue the rule in "substantially the same form" or issue a "new rule that is substantially the same" as the disapproved rule "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."[27]

The meaning of the "substantially the same form" language has not been examined by the courts and, what's worse, judicial review is potentially foreclosed by the statute itself. The uncertainty related to the prohibition of "substantially similar" rules is exacerbated by the CRA provision stating that "[n]o determination, finding, action, or omissions under this chapter shall be subject to judicial review."[28] Courts have generally interpreted this language to mean that they cannot consider any claims that an agency has failed to comply with the CRA.[29] However, various legal scholars have argued that

[27] Congressional Research Service, "The CRA: FAQs," at 17 (citing 5 U.S.C. § 801(f)).
[28] 5 U.S.C. § 805.
[29] Congressional Research Service, "The CRA: FAQs," at 1. See also, Michael J. Cole "Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construct 'Substantially the Same,' and Decline to Defer to Agencies under Chevron." *Administrative Law Review* 70 (Winter 2018), 53-107.

courts should review whether an new rule developed by an agency runs afoul of the "substantially the same" provision of the CRA.[30]

The possibility that agencies are forever barred from issuing regulations on the same subject matter as the disapproved rules may significantly limit the ability of *any entity* to address pressing issues of the day. As described above, Congress seems singularly unable to develop new legislation to address pressing matters and oftentimes, the only viable option is for executive agencies to jump into the fray. It is important, however, to note that the "substantially the same form" language was intentional. As the co-sponsors of the CRA stated in a post-enactment joint statement, this provision "gives the CRA teeth: without the provision, agencies could easily circumvent resolutions of disapproval."[31]

V. Disapprovals Under the CRA Have the Potential to Create Regulatory Uncertainty.

The CRA has the potential to create regulatory uncertainty for regulated industries. The CRA applies to all final rules. Under the Administrative Procedures Act, agencies must establish an effective date thirty days after the rule becomes final.[32] Only major rules are prevented from entering into force until sixty days after publication in the Federal Register or when a report is made to Congress.[33] In the case of a non-major rule

[30] Cole, "Interpreting the CRA: Why Courts Should Assert Judicial Review," at 68. Adam M. Finkel and Jason W. Sullivan "A Cost-Benefit Interpretation of the 'Substantially Similar' Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?" *Administrative Law Review* 63 (Fall 2011), 707-784. C

[31] Stephen Stanulli. "Use of the Congressional Review Act at the Start of the Trump Administration: A Study of Two Vetoes." *George Washington Law Review* 86 (September 2018), 1373-1391 (citing 142 Cong. Rec. 8199 (1996)).

[32] Congressional Research Service, "The CRA: FAQs," at 10.

[33] Ibid.

that goes final within sixty days of the adjournment of a session of Congress, there could be a delay of six to eight months between when the rule goes final and when Congress passes a disapproval resolution given the lookback period provided for in the CRA.[34]

In practice, there could be a long delay between a non-major rule going final and Congress disapproving that rule. For example, the Congressional Research Service has preliminarily found that rules that were finalized before August 21, 2020 may be subject to review under the CRA.[35] The 117th Congress has until April 2, 2021 to introduce CRA resolutions of disapproval.[36] This would leave over an eight-month window where rules could have been finalized yet still be considered for rescission under the CRA.

If a final rule is applicable one month after it is finalized, regulated industries might have been required to comply with the rule up to nine months prior to it being disapproved by Congress. Compliance with federal rules can often be costly (even if these rules are not major, meaning they do not meet the $100 million annual effect on the economy requirement).[37] If a company has brought itself into compliance with a new rule, the costs are sunk, and rescission is not in anyone's best interest.

The situation is exacerbated by the 2019 OMB memorandum which calls into question the effectiveness of many guidance documents extending all the way back to

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[34] Jace Lington, "COVID-19 might allow the 117th Congress to block more Trump administration regulations," *Ballotopedia News*, (May 23, 2020), accessed February 18, 2021 https://news.ballotpedia.org/2020/05/23/covid-19-might-allow-117th-congress-to-block-more-trump-administration-regulations. See also, George Washington University, *Congressional Review Act*.
[35] Congressional Research Service, "Congressional Review Act Issues for the 117th Congress: The Lookback Mechanism and Effects of Disapproval" by Maeve P. Carey and Christopher M. Davis (February 19, 2021), 6.
[36] Kelsey Brugger, "Dems weigh assault on Trump rules, but time is short." *E&E News,* March 17, 2021, accessed March 20, 2021 https://www.eenews.net/stories/1063727671.
[37] 5 U.S.C. § 804(2).

1996. If, under the CRA, these were deemed to have no effect, an enormous number of resources would have already been spent complying with these now-invalid requirements.[38] Companies will have implemented new policies, procedures, and installed new pollution control devices that may turn out to be unnecessary should a regulation or guidance be deemed ineffective under CRA.[39]

History/Background

I. THE ORIGINS OF THE CRA

The CRA was passed in March of 1996 as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA) section of the Contract with America Advancement Act of 1996. It amended the Administrative Procedures Act (APA). The Republican proponents of the Contract with America claimed that its reforms "would be the end of government that is too big, too intrusive, and too easy with the public's money."[40] The underlying sentiment of the need to shrink government and particularly the role of regulatory agencies, is alive and well today, twenty-five years later.

The CRA was passed on a bipartisan basis and was signed into law by a Democratic President – Bill Clinton.[41] Recognizing that Congress had delegated more

[38] Paul Larkin. "OMB's new Approach to Agency Guidance Documents." *The Regulatory Review*, Penn Program on Regulation (June 10, 2019).
[39] Letter from Thomas H. Armstrong, General Counsel, U.S. Government Accountability Office to Hon. Patrick J. Toomey (December 5, 2017), accessed February 13, 2021 https://www.gao.gov/assets/690/688763.pdf.
[40] Republican Contract with America, accessed February 16, 2021 https://web.archive.org/web/19990427174200/http://www.house.gov/house/Contract/CONTRACT.html.
[41] Bethany A. Davis Noll and Richard Revesz. "Regulation in Transition." *Minnesota Law Review* 104 (November 2019), 1-100. (highlighting that prior to the CRA, Congress had used a uni- or bi-cameral legislative veto to disapprove of agency rules. However, in 1983, in *Immigration & Naturalization Service v. Chadha*, the U.S. Supreme Court held that these practices circumvented the Constitution's bicameralism and presentment requirements (citing *INS v. Chadha,* 462 U.S, 919, 928 (1983)).

and more of its legislative functions to federal regulatory agencies, the CRA was an effort to "redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency."[42] Congress' objective was to provide oversight to agencies and to take responsibility for those regulations that withstood CRA review.[43] The CRA was deemed necessary because Congress believed that regulatory agencies sometimes developed rules that are at odds with congressional and public expectations.[44]

The CRA should be understood within the context of twentieth-century thinking about the role of regulatory agencies. Regulatory agencies have been under scrutiny constantly and consistently since they burgeoned as part of the New Deal. And efforts at "regulatory reform" have been ongoing since that time.

A significant segment of society still shares many of the concerns Congress expressed in 1996 regarding the administrative state and the regulatory agencies that comprise it. For instance, in 2016, the role of regulatory bodies was described as: "successive cycles of 'new' policy initiatives [that] have left behind an institutional residue that is now layered so thick as to be opaque to ordinary citizens' powers of inspection. Government is a sprawling, impenetrable edifice that is encountered with frustration . . .

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[42] 42 Cong. Rec. E575 (1996).
[43] Ibid., at E578 ("Congress is enacting the congressional review chapter, in large part, as an exercise of its oversight and legislative responsibilities."). The proponents of the CRA stated that it was necessary in part to make sure there is accountability for regulatory action; however, the Supreme Court stated, in 2019, in *Kisor v. Wilkie*, that "agencies . . . have political accountability, because they are subject to the supervision of the President, who in turn answers to the public." *Kisor v. Wilkie* 139 S. Ct. 2400, 2143 (2019).
[44] Ibid., at E575.

."[45] The magnitude of regulatory activity can be astounding: "[t]he Federal Register alone comprises some 70,000 pages annually. Any attempt at congressional oversight of these bureaucracies is impossible; the sheer size of the Administrative State is . . . incomprehensible."[46] In 2017, the administrative state was described in Forbes magazine as: 220,000 federal regulators working with a regulatory budget of about $63 billion who write and enforce . . . rules that cost the economy approximately $1.9 trillion annually.[47]

II. While the CRA was Used Successfully Only Once Prior to 2017, Interest Has Grown

Despite the fact that the CRA has been on the books since 1996, it was only used once before 2017. Because the CRA requires a majority vote in both houses of Congress and a signature by the President, it is most useful at times when there is a transition of power from a President of one party to a President of the other party and when Congress is in the hands of the incoming President's party. Otherwise, a President is very likely to veto any disapproval resolutions that arrive on his desk.[48]

In 2001, when the Bush Administration came into office and Republicans took control of Congress, Republicans in Congress led the effort to strike a rule promulgated by OSHA during the Clinton Administration. OSHA had been working on a version of the

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[45] Philip Wallach, "The administrative state's legitimacy crisis," at 4.
[46] Donald S. Dobkin, "The Rise of the Administrative State: A Prescription for Lawlessness," *Kansas Journal of Law & Public Policy* 17, no. 3 (Spring 2008), 362, 363.
[47] Chuck Devore, "The Administrative State is Under Assault and That's a Good Thing," *Forbes* (November 27, 2017), https://www.forbes.com/sites/chuckdevore/2017/11/27/the-administrative-state-is-under-assault-and-thats-a-good-thing/#2e7a01bb393c
[48] Robert V. Percival. "Presidential Management of the Administrative State: The Not-So-Unitary Executive," *Duke Law Journal* 5 (2001), 963, at 1002 ("Because the president can veto resolutions disapproving rules under the CRA, it is unlikely to be used frequently. . . except in circumstances where a new President seeks to block rules issued by a prior administration.").

ergonomics rule for a decade, but it was characterized by the 107th Congress as a "midnight" regulation.[49] The joint resolution of disapproval was passed in March of 2001 and signed into law by President Bush.

In the twenty years since the ergonomics rule was rescinded, OSHA has not attempted to issue a new rule to replace it. This is undoubtedly due to the prohibition on substantially similar rules. Any agency considering developing a replacement rule faces the threat of invalidation as the rule may be deemed substantially similar. In fact, all agencies "may be deterred from promulgating regulations within a certain area for fear of having its work nullified—or worse, of having ruined for posterity the ability to regulate in a given area."[50]

In the time between the OSHA ergonomics rule recission in 2001 and the beginning of the 115th Congress in 2017, no CRA joint resolution of disapproval made it through Congress. However, in the period between 2001 and 2009, thirty-nine CRA resolutions were introduced.[51] Some of these proposed CRA disapproval resolutions were sponsored by Democrats objecting rules passed by Bush-Administration agencies including one that would have had a negative impact on air quality. Had any of these resolutions passed both houses of Congress, President Bush would have likely vetoed them.

In 2009, When President Obama took office and the Democrats took control of Congress, the scene was set for the use of the CRA to overturn Bush Administration

[49] Finkel and Sullivan. "A Cost-Benefit Interpretation," at 726.
[50] Ibid. at 730.
[51] Sam Batkins. "Congress Strikes Back: The Institutionalization of the Congressional Review Act." *Mitchell Hamline Law Review* 45:2 (2019), 351-392, 366.

rules. Indeed, Congressional Democrats considered using the CRA to repeal the Bush Administration's midnight rules, but the Obama administration opted to use other tools available to it rather than run the risks associated with a CRA veto.[52] After Obama took office and, in the lead-up to the midterm elections – the 112th Congress (2011-12) – Republicans introduced a record-setting twenty-five CRA resolutions.[53]

III. SUCCESSFUL DEPLOYMENT OF THE CRA SKYROCKETED UNDER TRUMP AND DEMOCRATS WERE UNSUCCESSFUL IN ATTEMPTS AT A REPEAL OF THE CRA.

In 2017, when President Trump took office and Republicans took control of Congress, the Administration used every tool at its disposal to unwind Obama-era regulatory actions.[54] This included what some have characterized as reckless use of the CRA.[55] Shortly after the election, the Congressional Research Service issued a memorandum concluding that the look-back period under the CRA extended to May 30, 2016 and that nearly fifty major rules qualified for consideration under the CRA.[56] In the first four and a half months of the 115th Congress, fourteen joint resolutions of disapproval were passed.[57] All told, in 2017 and 2018, the CRA was used to rescind sixteen rules and a total of seventy-three resolutions were introduced.[58]

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[52] Finkel and Sullivan. "A Cost-Benefit Interpretation," at 729.
[53] Batkins. "Congress Strikes Back," at 369.
[54] Noll and Revesz "Regulation in Transition," at 2-3 ("he also made aggressive use of several relatively low-profile tools – disapprovals under the Congressional Review Act, abeyances in pending litigation, and suspensions of final regulations . . . .")
[55] McGarity et al. "The CRA: The Case for Repeal," at 2. ("Over the course of 2017, anti-safeguard members of Congress, with President Donald Trump riding shotgun, took the CRA for a reckless test drive, confirming just how dangerous the law is, especially when in the wrong hands.").
[56] Stanulli. "Use of the CRA at the Start of the Trump Administration," at 1381 (citing Congressional Research Service, "Major" Obama Administrations Rules Potentially Eligible to Be Overturned under the Congressional Review Act in the 115th Congress, by Maeve P. Carey (2016), 2).
[57] Ibid.
[58] Batkins. "Congress Strikes Back," at 376.

In May of 2017, just after the window closed to apply the CRA to Obama-era rules, the Sunset the CRA and Restore American Protections (SCRAP) Act of 2017 was introduced by Cory Booker in the Senate and a companion bill was introduced by David Cicilline in the House.[59] The bill would have repealed the CRA in its entirety and removed the prohibition on agencies reissuing a previously overturned rule, and it would have given agencies greater flexibility in reinstating such rules.[60] This bill was supported by various progressive groups. Those who favored the bill argued that the use of the CRA during the 115th Congress

> was an unmitigated disaster for those who believe in Internet privacy, gun control, protecting the environment and clean water, women's health, workplace safety, fair pay measures, and retirement security. But for a handful of big corporations that spent more than $1 billion lobbying to get their way, it was Congress's finest moment.[61]

Others who supported a repeal argued that "[b]y unwinding the significant public health, safety, environmental or financial protections these safeguards would otherwise have delivered, each CRA resolution that is adopted boils down to a direct assault on the public interest."[62] As predicted, the SCRAP Act did not pass through either house of the Republican-controlled Congress and died. No further efforts to repeal the CRA have since been proposed.

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[59] Congress.gov "S.1140 – SCRAP Act", 115th Congress, accessed February 16, 2021 https://www.congress.gov/bill/115th-congress/senate-bill/1140. Congress.gov "H.R. 2449 – SCRAP Act," 115th Congress, accessed February 16, 2021 https://www.congress.gov/bill/115th-congress/house-bill/2449/text.
[60] "Ciciline, Booker Introduce Bill to Repeal Congressional Review Act." Congressman David Cicilline, Media Center, accessed February 16, 2021 https://cicilline.house.gov/press-release/cicilline-booker-introduce-bill-repeal-congressional-review-act.
[61] Lisa Gilbert and Amit Narang. "Scrap the Congressional Review Act." *The Regulatory Review*, Penn Program on Regulation (June 7, 2017).
[62] McGarity et al. "The CRA: The Case for Repeal."

IV. DURING THE TRUMP ADMINISTRATION, THE CRA WAS EXPANDED TO APPLY BEYOND MIDNIGHT RULES.

Shortly after the SCRAP Act failed, the Government Accountability Office (GAO) responded to an inquiry from Senator Pat Toomey (R-PA) regarding a final interagency guidance document which was issued in 2013. The GAO found that the interagency guidance "is a general statement of policy and is a rule under the CRA."[63] In light of the GAO letter, a resolution of disapproval regarding the 2013 guidance was introduced in the Senate in March of 2018, it passed both houses of Congress, and was signed into law within two months.[64]

After the 115th Congress rescinded this five-year-old guidance, the Office of Management and Budget issued a memorandum, superseding a memorandum issued in 1999, interpreting the CRA's reporting requirements for federal agencies and adopting an expansive interpretation of what constitutes a "rule" under the CRA.[65] The OMB guidance has been interpreted to extend the meaning of a rule for purposes of the CRA to include many different types of guidance including regulatory guidance letters, Dear Colleague letters, bulletins, advisory circulars, etc.[66] "Agencies have issued thousands of guidance documents. . . , but have submitted only a fraction of . . . them to Congress."[67] Under the OMB memorandum, all of those could potentially be subject to CRA review.

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[63] Letter from Susan Poling, General Counsel Government Accountability Office to Senator Pat Toomey (October 19, 2017), accessed February 16, 2021 https://www.gao.gov/assets/690/687879.pdf.
[64] Batkins. "Congress Strikes Back," at 385.
[65] Russel T. Vought, Office of Management and Budget, "Guidance on Compliance with the Congressional Review Act." (April 11, 2019), accessed February 16, 2021 https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf.
[66] Larkin. "OMB's new Approach to Agency Guidance Documents."
[67] Ibid.

The Brookings Institution attempted to provide a "more realistic" analysis of how many additional "rules" could be subject to CRA review based on the 2018 recission. This analysis supports a narrower interpretation of the 2019 OMB memorandum as well. Brookings' analysis found that between 1996 and 2016, there were "348 significant rules with apparent reporting deficiencies to one or more of the GAO, House, and Senate, out of a total of 3,197 significant rules."[68] The analysis concludes that probably most of the identified rules are "unlikely to engender much controversy. . . . [b]ut there are a good number that probably are quite controversial."[69]

V. LIVE ISSUES ASSOCIATED WITH THE CRA.

At present, the CRA is fully functional; there are two major unknowns about its application which could create significant problems should the law remain in place. Despite the CRA becoming law in 1996, it has not been tested because it was not applied in earnest until 2017.

One of the most potentially consequential of these unknowns is how the prohibition on "substantially similar" rules will play out. The questions include: (1) When a regulation which was adopted pursuant to a statutory requirement and has been rescinded pursuant to the CRA, can the agency reissue the rule absent Congress passing new authorizing legislation permitting it to do so?[70] (2) Are agencies disallowed from reissuing regulations that cover the same substantive area of law, and if they are

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[68] Philip A. Wallach and Nicholas W. Zeppos. "How powerful is the Congressional Review Act?" (Washington, DC: Brookings, 2017), accessed April 30, 2021 https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/.
[69] Ibid.
[70] McGarity. "The CRA: A Damage Assessment," at 9.

permitted, will they follow OSHA's model and opt not to expend resources developing a new regulation given the possibility that the replacement rule will be rejected because it is not substantially different?[71] (3) If an agency reissues a rule, who has the power to determine if it is substantially the same – the agency, the courts or Congress? (4) Do the courts have the authority to evaluate a new rule to determine if it is substantially different or substantially the same?[72] (5) If courts were to determine that they have the authority to review replacement rules to determine if they are substantially different, would they apply the arbitrary and capricious standard or grant the agency deference under *Chevron* and its progeny.[73]

The other set of unknowns associated with the CRA is the scope of its application. The 2019 OMB Memorandum expanded the interpretation of what constitutes a "rule" under the CRA from the earlier 1999 OMB memorandum which was silent on guidance documents. OMB stated that "the CRA adopts the [APA's] expansive definition of 'rule,' which includes, subject to certain exceptions, 'the whole or a part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy . . . .'"[74] This has been interpreted to mean that the CRA applies to

[71] Finkel and Sullivan "A Cost-Benefit Interpretation," at 730 (quoting Statement of Elaine L. Chao, Secretary, U.S. Department of Labor: "she did not want to 'expend valuable—and limited—resources on a new effort' if another regulation would be invalidated as substantially similar.")
[72] There is a range of views on whether this issue is precluded by the CRA's prohibition on judicial review of any "determination, finding, action, or omissions under this chapter." 5 U.S.C. § 805. See Congressional Research Service, "The CRA: FAQs," at 18; but see Cole. "Interpreting the CRA," at 68 and M. Finkel and Sullivan. "A Cost-Benefit Interpretation."
[73] Cole. "Interpreting the CRA," at 55.
[74] Vought. "Guidance on Compliance with the Congressional Review Act," at 1-2.

"every agency memorandum that tells private parties what they must, may, or may not do."[75]

The OMB memorandum also addresses the ability of agencies to act without first seeking approval from the Office of Information and Regulatory Affairs (OIRA). It states that agencies should not publish any rule anywhere (e.g., the Federal Register, their websites, or in any other public manner) until OIRA has made the determination that the agency has complied with all CRA requirements – such as sending them to Congress if appropriate.[76] This has the potential to significantly slow down the issuance of guidance documents and may become the subject of litigation.[77]

Further, the CRA states that until the CRA requirements of submitting reports to Congress has occurred, any rules have no effect. There is an argument that given OMB's 2019 pronouncements, that twenty-five years' worth of rules (that were not submitted to Congress) have no effect. Obviously, this would send shock waves through all government agencies and the industries regulated by them. This is likely why OMB did not go this far in its memorandum, but it is a natural extension of their analysis.[78]

VI. CURRENT SENTIMENT REGARDING USE OF THE CRA.

Despite the risks and challenges associated with deploying the CRA, many progressives are changing their tune since the Democrats took Congress and the Presidency. Even James Goodwin of the Center for Progressive Reform who argued vigorously for repeal of the CRA now recognizes that the CRA "could be put to positive

[75] Larkin. "OMB's new Approach to Agency Guidance Documents."
[76] Vought, "Guidance on Compliance with the Congressional Review Act," at 4.
[77] Larkin. "OMB's new Approach to Agency Guidance Documents."
[78] Ibid.

short-term use" to repeal "those [Trump] rollbacks that would reinstate those rules and benefits they delivered." He states, "The CRA offers some utility to supporters of regulatory safeguard in the next Congress" while not endorsing its use per se.[79] Democrats are clearly considering using the CRA to reverse what is perceived as Trump's rollbacks of Obama-era midnight rules that relaxed regulations on the environment, on oversight of banks, on transparency, and internet service companies.[80] As one scholar who has written in this area stated: "It's the quickest way to get rid of policies that will cause significant harms to the health of Americans and to the quality of our environment."[81]

Policy Proposal

Despite the fact that interest in employing the CRA has been growing among members of both parties over the last two decades and the fact that the last Republican-controlled Congress deployed it successfully to overturn sixteen CRA "rules," this Administration should completely repeal the CRA[82] and allow agencies to reissue a previously overturned rule. The proposal to seek to repeal CRA should be sought by June of 2021 by the 117th Congress. By repealing the CRA in its entirety, executive agencies will be reassured of the value of working to develop sound and protective regulations,

[79] James Goodwin. "The Congressional Review Act Could be put to Positive Short-Term Use, But it Should Still be Repealed," (Washington, DC: Center for Progressive Reform, 2020).
[80] Sarah Hansen, "Democrats Eye Senate Control – Here's How They Could Roll Back Trump's 'Midnight' Regulations." *Forbes* (January 6, 2021). See also, Katelynn Bradley et al. "It's Back: the Congressional Review Act and Implications for Recent Environmental Rules." Robert Mangas and Barringer. "Will the New Congress Reverse Any 'Midnight Rules?" Posner. "Will the new Congress use the Congressional Review Act to nullify recent rulemakings?"
[81] Kelsey Brugger. "Senate Democrats eye quick repeal of Trump rules." *E&E News Reporter* (January 6, 2021) (quoting Professor Ricky Revesz of New York University).
[82] Chapter 8 of title 5, United States Code.

thereby filling the gaps left by current legislation. Repealing the CRA will also prevent the waste of resources associated with striking regulations that have been developed over the course of years, and it will allow reissuance of rules that have been vetoed through the CRA or the issuance of new rules covering the same subject-matter area.

I. POLICY AUTHORIZATION TOOL

The only means to accomplish this policy goal would be to propose new legislation in the House and Senate to repeal the CRA in its entirety. The legislation would be a reintroduction of the Sunset the CRA and Restore American Protections Act of 2017 or the SCRAP Act.[83] The new bill would not need to amend the SCRAP Act of 2017; rather it could simply be reintroduced as the SCRAP Act of 2021 during the 117th Congress with the objective of passage by June of 2021 – the period during which the threat of application of the CRA to revoke Trump-era rules is effective.

An executive order cannot be used to repeal a statute.[84] While the courts could find the CRA unconstitutional, that route to challenge the CRA has been attempted and has failed. Courts have held that the CRA does not to contain the constitutional infirmities that were at issue in *INS v. Chadha.*[85] The CRA addressed the separation-of-powers issue and the violation of the Take Care clause that were fatal to the statute at issue in *INS v. Chadha.* In *Center for Biological Diversity v. Bernhardt,* the U.S. Court of

[83] See S. 1140 – 115th Congress and H.R. 2449 – 11th Congress.
[84] "Power of the Legislature to Amend or Repeal Direct Legislation." Washington University Law Review 27:3 (1942), 439 ("It is a fundamental principle of our system of representative government hat the legislative department has plenary power to enact laws and to amend or repeal them, subject only to the provisions of the constitution from which this power arises.")
[85] *INS v. Chadha,* 462 U.S. 919, 928 (1983).

Appeals for the 9th Circuit was evaluating a CRA joint resolution of disapproval. The court held that "Congress complied with the process of bicameralism and presentment in enacting the Joint Resolution . . . the Joint Resolution . . . did not prevent the President from exercising his constitutional duty to faithfully execute the laws."[86]

The SCRAP Act of 2021 bill could be introduced by the same Representatives and Senators who introduced the SCRAP Act in 2017. In the Senate, the bill was introduced by Senator Cory Booker and co-sponsored by Senator Tom Udall. In the House, it was introduced by Representative David Cicilline and co-sponsored by Representatives John Conyers Jr., and Matt Cartwright. All of these representatives other than John Conyers Jr. are still in office. Given that there is a distinct possibility of Democratic use of the CRA in the 117th Congress, it may even be possible to get Republican co-sponsors. Once passed by Congress, the SCRAP Act of 2021 would become effective immediately upon signature by the President.

The SCRAP Act of 2021 would repeal Chapter 8 of Title 5 of the U.S. Code (i.e., the CRA) in its entirety. It would also make the following to changes to other statutes that reference the CRA:

> (1) FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT.—Section 102(a) of the Family Smoking Prevention and Tobacco Control Act (21 U.S.C. 387a–1(a)) is amended by striking paragraph (7).
>
> (2) AMERICAN JOBS CREATION ACT OF 2004.—Section 642 of the American Jobs Creation Act of 2004 (7 U.S.C. 519a) is amended by striking subsection (c).
>
> (3) FARM SECURITY AND RURAL INVESTMENT ACT OF 2002.—Section 1601(c) of the Farm Security and Rural Investment Act (7 U.S.C. 7991(c)) is amended by striking paragraph (3).

[86] *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 562 (9th Cir. 2019).

(4) FOOD, CONSERVATION, AND ENERGY ACT OF 2008.—Section 1601(c) of the Food, Conservation, and Energy Act of 2008 (7 U.S.C. 8781(c)) is amended—

(A) by striking paragraph (3); and

(B) by redesignating paragraph (4) as paragraph (3).

(5) AGRICULTURAL ACT OF 2014.—Section 1601(c) of the Agricultural Act of 2014 (7 U.S.C. 9091(c)) is amended by striking paragraph (3).

(6) FOOD SECURITY ACT OF 1985.—Section 1246 of the Food Security Act of 1985 (16 U.S.C. 3846) is amended by striking subsection (c).

(7) FEDERAL NONNUCLEAR ENERGY RESEARCH AND DEVELOPMENT ACT OF 1974.—Section 12 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5911) is amended—

(A) by striking "(a) The President" and inserting "The President"; and

(B) by striking subsection (b).

(8) ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965.—Section 1601(e) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6571(e)) is amended by striking "or chapter 8 of title 5, United States Code (commonly known as the 'Congressional Review Act')."

(9) PUBLIC HEALTH SERVICE ACT.—Section 401(f)(4) of the Public Health Service Act (42 U.S.C. 281(f)(4)) is amended by striking the second sentence.

(10) CREDIT UNION MEMBERSHIP ACCESS ACT.—Section 205 of the Credit Union Membership Access Act (12 U.S.C. 1759 note) is repealed.

(11) MEDICARE PRESCRIPTION DRUG, IMPROVEMENT, AND MODERNIZATION ACT OF 2003.—Section 303(i) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (42 U.S.C. 1395u note) is amended—

(A) by striking paragraph (5); and

(B) by redesignating paragraph (6) as paragraph (5).

(12) TAX AND TRADE RELIEF EXTENSION ACT OF 1998.—Section 5101(i)(1) of the Tax and Trade Relief Extension Act of 1998 (42 U.S.C. 1395x note) is amended by striking "(without regard to chapter 8 of title 5, United States Code)."

Further, the SCRAP Act of 2021 would provide a means to reinstate disapproved rules. There would be an option to fast-track reinstatement wherein a federal agency could reinstate a rule for which a joint resolution of disapproval had been enacted under the CRA by publishing the covered rule within a one-year period after the enactment of the SCRAP Act. For rules which are not fast-tracked for reinstatement, a Federal agency could reinstate the rule using the traditional rulemaking procedures under the Administrative Procedures Act.

II. POLICY IMPLEMENTATION TOOL

In order to build support within the Democratic party in Congress, it will be valuable to highlight the other tools that are available to this administration to address problematic Trump Administration rules and make clear how that authority extends beyond the shorter timeline for application of the CRA. To build support among Republicans, it would be useful to make clear that a failure to support the repeal of the CRA leaves open the possibility of it being deployed to undo many of the Trump-era midnight rules. Appeals to conservative trade associations that are unhappy with currently proposed resolutions could bring some pressure to bear on Republican Senators and Representatives.

In order to build popular support for the repeal of the CRA, the administration and favorable representatives should use their bully pulpits to bring to light the reckless and perhaps corrupt use of the CRA by the Trump Administration. Hearings should be held to investigate whether there is any truth to claims that corporate donations were

largely behind which rules were disapproved using the CRA.[87] Further, a media strategy should be unveiled that highlights the rules that were disapproved, focusing on those that most Americans will strongly support such as the FCC's internet privacy rule, the CFPB's indirect auto lenders rule which protected minorities from discriminatory lending practices, and the Department of Interior's Alaska predators protection rule. Polling could be completed to determine which of the overturned rules are the most important to Americans.

Because the SCRAP Act should create a net savings for the federal government, this would not be an impediment. The Congressional Budget Office did not complete a cost estimate for the SCRAP Act of 2017. However, what is clear is that the SCRAP Act does not create any new bureaucracy and prevents the disapproval of regulations that have, on average, been completed as a result of several years of work by executive agencies.

Policy Analysis

Passage of the SCRAP Act of 2021 would have the effect of repealing the CRA and would thereby address the problems identified that are created by the CRA. However, doing so would strip Congress of the powers that the CRA provided; therefore,

[87] See, e.g., "The CRA Must Go and Repealed Protections Must Be Restored," Public Citizen (May 16, 2017) ("This year's unprecedented rush of regulatory reversals came at the behest of corporate interests that spent more than $1 billion to get their way in Congress – and President Donald Trump and congressional Republicans were more than happy to oblige. As a result, corporate predators, polluters and profiteers who would have been reined in by these rules are now free to abuse, exploit and discriminate against regular Americans, knowing they won't be held accountable."), accessed February 23, 2021 https://www.citizen.org/news/the-cra-must-go-and-repealed-protections-must-be-restored/, see also Gilbert and Narang. "Scrap the Congressional Review Act," and McGarity et al. "The CRA: The Case for Repeal."

any analysis of this policy proposal, must weigh the problems created by the CRA against the benefits of the CRA and the goals of the CRA.

I. WHAT IS TO BE GAINED BY SCRAPPING THE CRA?

In evaluating a new SCRAP Act, passage of this bill would have the desired effect, i.e., it would repeal the CRA which would, in turn, remove at least some of the negative consequences associated with the Act. Therefore, to evaluate the wisdom of passing the SCRAP Act and repealing the CRA, it is important to consider the problems created by the CRA and to understand whether they would actually be fixed.

The goal of repealing the CRA would be to address the issues created by the law among them:

- The CRA impact on the efficiency of agency rulemaking.
- The issuance of joint resolutions of disapproval under the CRA wastes federal resources insofar as the rules that are vetoed are years in the making and require expenditure of significant resources to develop.
- The CRA strips protection from American citizens; the rules that are at risk protect America's health and environment, the U.S. economy, and support equal treatment of all Americans.
- The safeguards created by the rules subject to CRA review might not be available post-CRA veto because the statute disallows new substantially similar rules.

As a backdrop to analyzing the ways that a repeal of the CRA would impact rulemaking, it is important to understand the drivers of rulemaking. The need for regulations has been characterized as arising because "a concerned citizenry has demanded that Congress enact legislation to protect the public from the adverse effects of the activities" legitimately undertaken by individuals and corporations seeking

economic gains.[88] And, because Congress rarely specifies in detail how the statutory protections are to be implemented in the real world, implementation is typically delegated to federal agencies that are "tasked with 'filling up the details' in legislation pursuant to the procedures specified in the legislation or in the Administrative Procedure Act. [89] Some would argue that currently, regulations must fill even bigger gaps – i.e., the regulations "try to address the problems that confront the country" but finding the statutory frameworks lacking, they act "through creative readings of statutory authority, to identify sources of power to deal with" these serious problems.[90]

A. Repeal of the CRA would Facilitate More Efficient and Appropriate Agency Rulemaking

1) *The CRA may slow down the rulemaking process overall.*

One of the goals of repealing the CRA is to facilitate the smooth development and implementation of regulations by executive agencies. In terms of the impact on the efficiency in rulemaking, the CRA has a built-in delay mechanism: a minimum of a sixty-day delay is associated with Congressional review that is part and parcel of the CRA.[91] Further, the CRA may slow down the process as agencies need to pad their analyses to insulate rules from congressional review.

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[88] Thomas O. McGarity "The Courts and the Ossification of Rulemaking." Texas Law Review (75), 1997.
[89] Ibid. Jason Webb Yackee and Susan Webb Yackee. "Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990." George Washington Law Review (80), 2012.
[90] Oakes et al. "The Future of Administrative Law," at 10186. See also Yackee and Yackee. "Testing the Ossification Thesis," at 1466 (addressing whether the regulators correctly and promptly finish the legislative responsibilities that Congress routinely delegates or perhaps abdicates).
[91] 5 U.S.C. § 801(3). This doubles the thirty-day delay that is already built into the Administrative Procedures Act. 5 U.S.C. § 553.

The CRA can be thought of as one of many efforts at "regulatory reform" that Congress has established in order to "rein in" the administrative state. This effort began with the passage of the Administrative Procedures Act in 1946.[92] Since the CRA had not been used extensively until 2017, and the agencies were functioning under the same administration that deployed the CRA until January 2021, the implications of the use of the CRA have not yet been empirically studied. Therefore, it is helpful to look at the analysis of the impacts of other regulatory reform measures.

Some argue that the impact of regulatory reform has made rulemaking "'costly, rigid, and cumbersome' and afflicted by 'perverse incentives that conspire to undermine sound public policy."[93] This situation has been described by some as resulting in "ossification" of the rulemaking process but other scholars marshal evidence to claim this is not the case. Studies on the impact of judicial review have found that about half of the rules that are evaluated by the courts are remanded at least in part.[94] A more recent study considering the impact of increased public participation in the form of comments found that in the case of "complex" rules, more participation meant slower finalization of rules.[95]

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[92] McNollgast. "The Political Origins of the Administrative Procedures Act." *Journal of Law, Economics & Organization* (15:1), March 1999.
[93] Yackee and Yackee. "Testing the Ossification Thesis." (quoting Jody Freeman, "Collaborative Governance in the Administrative State." *UCLA Law Review* (45) 9 n. 19. (1997)).
[94] Peter H. Schuck and E. Donald Elliott. "To the Chevron Station: An Empirical Study of Federal Administrative Law." 1990 *Duke Law Journal*, 984-1022. Patricia M. Wald. "Judicial Review: Talking Points." *Administrative Law Review* (48) 350 (1996).
[95] Stuart Shapiro. "Does the amount of participation matter? Public comments, agency responses and the time to finalize a regulation." *Policy Science* (41) (2008), 33-49.

Researchers Jason and Susan Webb Yackee argue that ossification is not a significant issue and have concluded that the system is not fundamentally broken despite accepting the assertion that in recent years, things do take longer.[96] Nonetheless, they conclude that "evidence that ossification is either a serious or widespread problem is mixed and relatively weak."[97] They claim that agencies appear to be able and willing to issue substantial numbers of regulations relatively quickly. They argue that there are more challenges associated with intra-agency red tape.[98] They draw no normative conclusion about the delays in terms of whether the delays result in improvements in the substance of the rules but only find that rules do appear to keep coming.

It is worth noting, however, that one of the very few examples the Yackees provide of a "socially worthwhile regulation" that was thwarted is OSHA's ergonomics rule which was overturned pursuant to the CRA. In fact, the authors imply that the only successful use of the CRA at the time of their study may correctly be construed as ossification.[99]

There is no decisive conclusion that can be drawn from the research on regulatory reform and applied to the CRA but there does seem to be consensus that as

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[96] Yackee and Yackee. "Testing the Ossification Thesis," at 1466 (citing Thomas O. McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," *Duke Law Journal* (41) (1992), 1385 at 1388-90 (noting that now it might take five years to promulgate a rule where before it took about one to two years)).

[97] Ibid. at 1445. To evaluate whether there is ossification, the study looks at the following as empirical evidence: (1) volume of proposed and final rules, (2) length of time to promulgate rules, (3) abandonment of proposed rules, and (4) increasing reliance on methods other than notice-and-comment rulemaking. Ibid at 1440. The study demarcates the "pre-ossification period" as the mid-1970's, i.e., before the judicial "hard-look" doctrine was common.

[98] Ibid. at 1476.

[99] Ibid. at 1422.

regulatory oversight has increased, so has the time it takes to issue rules. Further, the research holds open the possibility that the CRA creates ossification.

2) *The CRA may impact the quality of rules developed as agencies race against the clock.*

One of the goals in repealing the CRA is to allow agencies to do the work of rulemaking without thinking about the speed of completing the task in time to insulate the rule from CRA review. [100] Agencies may deem the risk of CRA review high enough that they will rush to avoid the CRA's lookback period. Were agencies to rush through the process, they might not do a thorough enough job on the background research. As one scholar framed it, although final regulations rushed by agencies "might get to bed earlier, there is no guarantee that they will wake up looking better."[101] Some studies suggest that the quality of economic analyses may suffer if an agency is acting on a tight deadline.[102]

The risk of CRA nullification may drive agencies to opt out of contentious rulemakings.[103] "[F]acing a bigger threat of rollbacks might also cause agencies to be less likely to be ambitious or take policy risks, especially with rules they issue later in the presidential term." In the case of the Methane Waste Prevention rule, CRA disapproval

[100] Noll and Revesz. "Regulation in Transition," at 70-71.
[101] Stuart Shapiro. Will Congressional Review Act Repeals Change Agency Behavior?, *Regulatory Review* (April 3, 2007), https://www.theregreview.org/2017/04/03/shapiro-congressional-review-act-agency-behavior/ [https://perma.cc/ZR5Q-MXLS].
[102] Ibid. (citing Jerry Ellig and Christopher J. Conover. "Presidential Priorities, Congressional Control, and the Quality of Regulatory Analysis: An Application to Healthcare and Homeland Security." *Pub Choice* (161), 305, 306-307 (2014)).
[103] Noll and Revesz. "Regulation in Transition," at 72.

may hinge on just a few Senators so if the rule can be dulled just enough, it may not be overturned.

B. Repeal of the CRA would Avoid Wasted Efforts of Agencies and Wasted Expense Associated with Pursuing Rules that Are Ultimately Vetoed

When considering the cost of developing rules, the best indicator of the resources expended is the time invested by the agencies in developing the rules. In looking at the sixteen rules that were disapproved in 2016 and 2017, the average rulemaking took three years.[104] Two of the rules took over seven years to complete.[105] Some research indicates that the average time to complete a rule is five years and that particularly complicated or controversial rules take five to ten years to complete.[106] Comparatively, the provisions of the CRA allow for a fast-tracked disapproval with limited time for committees review, disallowance of filibusters and limited floor debate of a resolution in the Senate to ten hours.[107]

Even before a rule is published, agencies invest significant time and resources. Prior to the issuance of a notice of proposed rulemaking, agencies spend several years

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[104] McGarity et al. "The CRA: The Case for Repeal," at 28. ("On average, the 15 rules that were eliminated through the CRA had been in the works for approximately three years each."). Stuart Shapiro, "Why does it take so long to issue a regulation?" According to a 2009 GAO report: "FDA officials estimated that a straightforward rulemaking may take up to 3½ to nearly 4 years from initiation to final publication. DOT officials estimated approximately 1-½ years from the end of the public comment period following the publication of the proposed rule to final rule. SEC officials estimated that some rules are completed within 6 months of publication of a proposed rule to final rule. EPA officials declined to provide an estimate . . ." U.S. Government Accountability Office, Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews, GAO-09-205, April 20, 2009, p. 17.

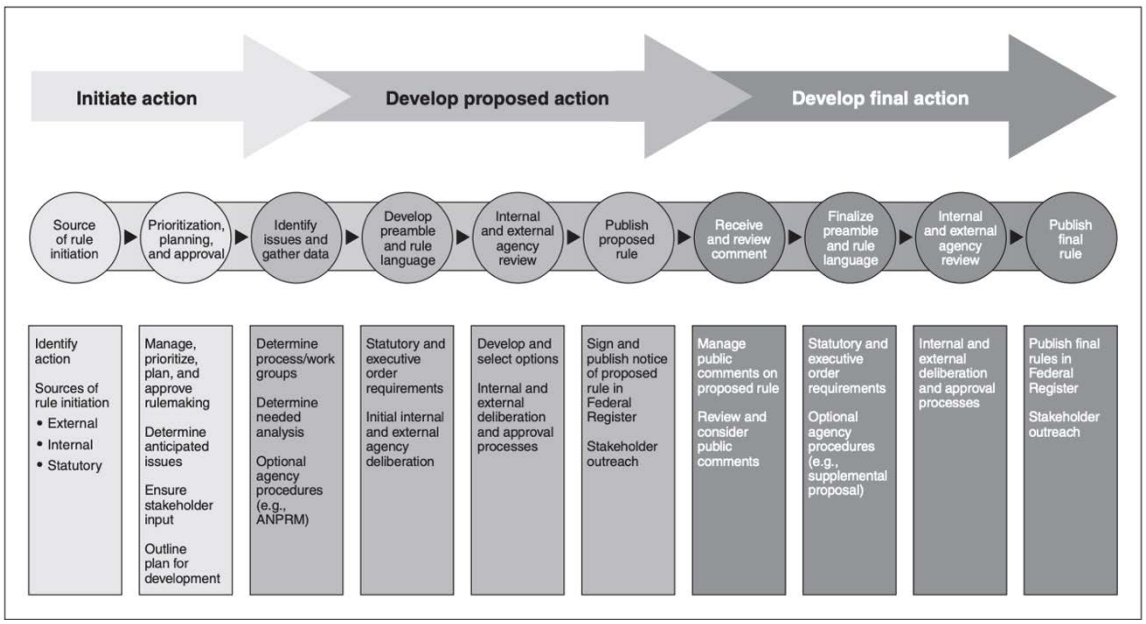
[105] McGarity et al. "The CRA: The Case for Repeal," at 28.

[106] Yackee and Yackee. "Testing the Ossification Thesis," at 1466 (citing McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," at 1388-90 noting that now it might take five years to promulgate a rule). Shapiro. "Why does it take so long to issue a regulation?" (citing cases of rulemakings taking upwards of 5-10 years).

[107] 5 U.S.C. § 802.

identifying the need for a rule, gathering stakeholder input, and collecting data. The General Accountability Office (GAO) said that "during an 'initiation phase, agencies gather information to determine whether to issue the rule, identify needed resources, and may draft concept documents for management."[108] The initial steps of the agency rulemaking process are shown clearly in Figure 2.[109]

Figure 2. Basic Phases of Rulemaking Process



During the second phase, the development of a rule is a coordinated effort, with economists, lawyers, policy and subject matter experts contributing to individual rulemakings. Also built into this phase are opportunities for internal and external deliberations.[110]

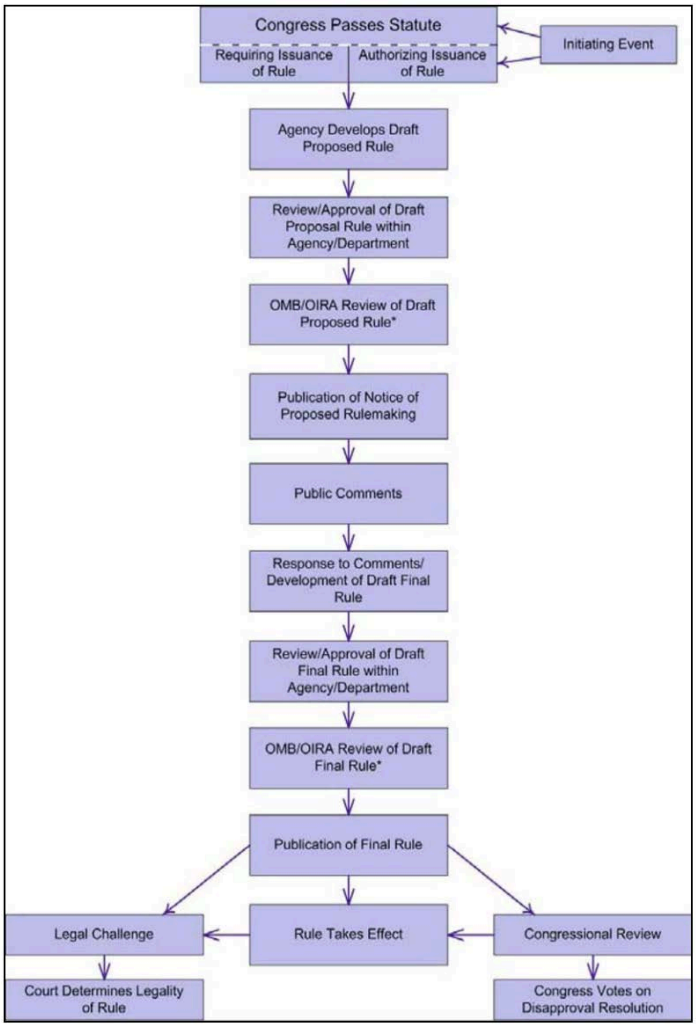
[108] Curtis W. Copeland. "The Unified Agenda: Implications for Rulemaking Transparency and Participation." Congressional Research Service (July 20, 2009) at 4 (citing U.S. Government Accountability Office, Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews, GAO-09-205, April 20, 2009, p. 22.).
[109] GAO, Federal Rulemaking: Improvements Needed, at 12.
[110] GAO, Federal Rulemaking: Improvements Needed, at 13.

Integrated with the internal agency process are reviews from OMB and within the Office of Information and Regulatory Affairs (OIRA). And, after the agency and OMB have completed their efforts, then there are Congressional and Judicial review as shown in Figure 2 below.[111] What this figure does not show, however, are the loops. For instance, a judicial decision can restart the process, sending the rule back to the agency to correct any infirmities.[112]

While hard data is not available regarding the number of work-hours committed per rulemaking or money expended with outside contractors on data collection and analysis, it is clear that the amount of work that executive agencies commit to develop rules is significant as are the costs associated with the process.

[111] Copeland. "The Unified Agenda: Implications for Rulemaking Transparency and Participation," at 3.
[112] See e.g., *API v. SEC*, 953 F. Supp. 2d 5, 8 (2013). (SEC anti-corruption rule was vacated by the D.C. District Court in 2013).

Figure 3. Detailed Overview of Steps Leading to a Rule



When viewed against the arduous, time-consuming and expensive process associated with rulemaking, the dearth of deliberation associated with joint resolutions under the CRA showcase the issue of continuing the current practice. Put simply, the CRA's provisions discourage meaningful deliberation. "With respect to the Senate, the CRA prohibits consideration of amendments and most other motions while capping floor debate at just 10 hours, split evenly between those in favor and against the resolution."[113] Not only are the hours of

[113] McGarity et al. "The CRA: The Case for Repeal," at 25. See also, William Yeatman, "The Case for Congressional Regulatory Review." (Washington, DC: CATO Institute) 2020, accessed April 30, 2021 https://www.cato.org/policy-analysis/case-congressional-regulatory-review.

debate limited, during the 115th Congress the supporters of joint resolutions of disapproval ceded most if not all of their five-hour allotments during floor debate.[114]

This analysis shows that when the CRA is used to effectively veto a regulation, years of work is essentially jettisoned, and it is done so with very little deliberation or analysis. As the Obama and Trump administrations demonstrated, there are other ways to get rid of problematic rules. They are certainty more cumbersome, but they involve the considered judgment of the agencies repealing and replacing rules, or of Congress through appropriations or legislative changes.[115]

C. Repeal of the CRA would Ensure that Agencies Continue to Protect Americans' Health, Environment and Promote Equitable Treatment Through Rulemaking

In considering whether the passage of the SCRAP Act of 2021 and a repeal of the CRA would ensure protection, it is instructive to understand the history of joint resolutions of disapproval that have passed and been enacted since the CRA became law. Four inter-party transitions have occurred since the passage of the CRA: from Bill Clinton to George W. Bush in 2001, from George W. Bush to Barack Obama in 2009, from Barack Obama to Donald Trump in 2017, and from Donald Trump to Joe Biden in 2021. In that time, prior to 2017, a rule was only rescinded once, by George W. Bush in 2001. When Obama took office, thirty-two rules were deemed eligible for disapproval, but Obama opted not to use the CRA; rather, his administration used regular rulemaking

[114] McGarity et al. "The CRA: The Case for Repeal," at 25. See e.g., Noll and Revesz, "Regulation in Transition," at 71 ("during the Clinton administration, Congress used appropriations riders to block the Department of Labor from issuing any rule addressing ergonomics injuries.")
[115] See generally, Noll and Revesz, "Regulation in Transition," at 5. (looking at all the tools available to a President).

procedures to overturn targeted rules.[116] Under Trump, on the other hand, the CRA was used to strike sixteen rules. When comparing Trump with George W. Bush and Obama, some scholars have pointed out that Bush and Obama were comfortable "using the administrative state to advance [their] policy goals."[117]

As shown above in the Statement of the Problem section of this memorandum, the CRA has only been used to strike protective rules. These were rules that were designed to "protect consumers, investors, workers, low-income women, students, the environment, and potential victims of gun violence."[118] This empirical evidence shows that the CRA has been deployed to take away safeguards and to make American society less equitable. It is the tool of anti-regulatory Presidents, or Presidents who do not see administrative rulemaking as a desirable means to get things done, as Paul Larkin, a Senior Fellow at the Heritage Foundation, would argue.[119]

The hesitancy to apply the CRA by Presidents who see the value of agency rulemaking is tied to the prohibition on agencies issuing a new rule that is "substantially the same" as the one vetoed under the CRA.[120] The Obama Administration could have used the CRA to roll-back Bush midnight rules which were anathema to Democrats in the 111th Congress including rules that decreased protection of endangered species, allowed

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[116] Ibid. at 18-19.
[117] Paul Larkin. "Reawakening the Congressional Review Act." *Harvard Journal of Law & Public Policy* (41) (Winter 2018); 188-252, 243-244.
[118] McGarity. "The CRA: A Damage Assessment," at 2.
[119] Paul Larkin. "Reawakening the Congressional Review Act," at 243-244. Noll and Revesz, "Regulation in Transition," at 22.
[120] 5 U.S.C. § 801 (b)(2) (stating that a "rule [that is vetoed under the CRA] may not be reissued in substantially the same form, and a new rule that is substantially the same [as a rule that is vetoed under the CRA may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.")

development of oil shale on some federal lands, and opened up oil drilling in the Utah wilderness as well as a conscientious objector regulation that allowed certain healthcare providers to refuse to administer abortions or dispense contraception.[121] It was this same concern that drove Senator John McCain and other Republican Senators to break ranks with their party on the proposed veto of the Methane Waste Prevention Rule. BLM's rule was intended to reduce emissions of methane to the environment through venting, flaring, and leaks. McCain said, "[w]hile I am concerned that the BLM rule may be onerous, passage of the resolution would have prevented the federal government, under any administration, from issuing a rule that is 'similar,' according to the plain reading of the Congressional Review Act."[122] This might have made it impossible to regulate methane emissions, which McCain believed could impact public health.

The extent of this prohibition on substantially similar rules has not been tested. But it is possible that in the not-too-distant future, the strength of this prohibition will become clear. The significant number of CRA disapprovals during the Trump era and the fact that the current administration has different policy priorities, may mean that we will see a test of this rule. As scholars have pointed out, "since there has never yet been an attempt by an agency to reissue a rule following a CRA veto, there remains ambiguity not only over what kinds of rules are barred, but how any such restrictions would be enforced."[123] If the current administration were to issue new regulations to replace those vetoed under the CRA during the Trump Administration, any party aggrieved by the

[121] Finkel and Sullivan. "A Cost-Benefit Interpretation," at 729.
[122] "Oil and Gas: After failed CRA try, methane fight moves to Courts, Interior." *Climatewire* (10:9) May 11, 2017.
[123] Finkel and Sullivan. "A Cost-Benefit Interpretation," at 730.

replacement regulation could initiate an Administrative Procedures Act challenge arguing that the agency lacked the authority to issue the regulation because it is "substantially the same" as one that was vetoed.[124]

In sum, it is clear that getting rid of the CRA would have the effect of protecting Americans' health and environment, protecting low-income workers, providing protection against large corporations, and make America a more equitable nation.

D. What Will Be Lost If the CRA is Repealed?

While there appear to be benefits to repealing the CRA in terms of avoiding economic waste, allowing for more flexibility and efficiency in the rulemaking process, and supporting the development of protective regulations, this must be balanced against what will be lost if the CRA is repealed. To understand what is at risk it is helpful to look to the legislative intent of, and the rationale that supported passage of, the CRA. While there is no legislative history that we can turn to, the co-sponsors of the CRA issued a post-enactment joint statement laying out legislative intent.[125]

1) *Repeal of the CRA would shrink Congressional Oversight Options and Remove Congress's "Cleanest" Mechanism for Recission of a Rule*

Congress hoped that the CRA would rebalance the roles of the legislative and executive branches of government. It was anticipated that the CRA would "help to redress the balancing, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency."[126]

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[124] Stanulli. "Use of the CRA: A Study of Two Vetoes," at 1386-1387.
[125] 42 Cong. Rec. "Extension of Remarks," E571-E579.
[126] 42 Cong. Rec. E575.

The CRA was a recognition that "Congress has come to depend more and more upon Executive Branch agencies to fill out the details of programs it enacts" and a response to the claims "that Congress has effectively abdicated its role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments."[127]

The impulse behind the CRA has existed for the better part of the last century. The legislative veto was developed in response to the expanding government resulting from The Great Depression. "As early as the 1930s, members of Congress worried that wide delegations of administrative authority would leave the unelected bureaucracy politically unaccountable."[128] Legislative vetoes were initially built into other statutes rather than a stand-alone statute like the CRA. Initially, they were common in governmental reorganization statutes but by the 1940s, legislative vetoes were applied in national security and foreign affairs laws as well. During the 1950s, the number of statutes affected by legislative vetoes continued to grow. In the 1960s and 1970s, public trust in executive agencies waned concomitant with the federal government becoming more actively involved in the economy in an effort to pursue social and economic goals. During this era, Congress dramatically increased the use of legislative vetoes.[129] All of this changed with the U.S. Supreme Court's decision in 1983, when the Court found the

[127] Ibid.
[128] "The Mysteries of the Congressional Review Act," at 2164 (citing Jessica Korn, The Power of Separation 4-5 (1996)).
[129] Anthony M. Bottenfield. "Comment: Congressional Creativity: the Post-Chadha Struggle for Agency Control in the Era of Presidential Signing Statements." 112 *Pennsylvania State Law Review* (2008), 1125, 1128.

unicameral veto that was in place to be unconstitutional in *INS v. Chadha*.[130] The CRA was an effort to recapture the capacities that were taken away in that case.

In sum, if the CRA is repealed Congress will have one less arrow in its quiver with which to oversee and manage the executive agencies. While this is certainly the case, there are those who would argue that legislative vetoes and the CRA have generally not been effective at achieving these Congressional goals and that there are other means available to address the desire to keep the bureaucracy in check.

When looking at the usefulness of legislative vetoes prior to 2017, scholars found that the legislative veto was rarely used and was of limited effectiveness. It was thought that the "legislative veto had great political value to members of Congress intent on demonstrating to constituents that they were overseeing another otherwise unchecked federal bureaucracy."[131] The same assertion is made about the CRA – that it may have been more about signaling to constituents and agencies Congress's intent to police the bureaucracy.[132] While all of this may have been true prior to 2017, nobody can doubt that the 115th wielded the CRA as a powerful tool to "rein in the bureaucracy."

While there may be other means to manage bureaucracy, it is clear that the CRA provided a more streamlined method to rescind a rule and provided Congress additional time to act before the rule entered into effect. Under the Administrative Procedures Act, all final rules had to be published at least thirty days before their effective date, during

[130] *INS v. Chadha,* 462 U.S. 919 (1983).
[131] "The Mysteries of the Congressional Review Act," at 2165
[132] Ibid. at 2165-66.

which time Congress could use the ordinary legislative process to overturn any regulation before it goes into effect.[133] As the CRA co-sponsors wrote: "The reason for the delay in the effectiveness of a major rule beyond that provided in the APA subsection 553(d) is to try to provide Congress with an opportunity to act on resolutions of disapproval before the regulated community must invest significant resources necessary to comply with a major rule."[134]

While the CRA created a streamlined tool for Congressional oversight, it did not endow Congress with new powers *per se*. "Congress [could] already enact legislation to prevent any and all regulations from becoming law."[135] In addition to the ability to overturning undesirable rules through the ordinary legislative process, Congress establishes the substantive content of agency authority, creates informational, budgetary, and other controls to which it will the agency is subject, and "maintains a formidable omnipresence through its oversight, appropriations and confirmation processes."[136]

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[133] Ibid. at 2167 (citing 142 Congressional Record 6815 (statement of Sen. Nickles) ("As all of my colleagues are well aware, the Congress at any time can review and change, or decide not to change, rules or their underlying statutes."))

[134] 42 Cong. Rec. E576. One thing to note is that in light of the OMB 2019 memorandum stating that any guidance document that was not submitted to Congress was subject to Congressional Review under the CRA, Congress's intent to avoid commitment of resources by regulated parties before the rule could go into effect was thwarted. Even if the rule is legally "not in effect" many of these guidance documents have been well accepted and adhered to by regulated parties which means these entities have likely spent significant sums of money complying with them.

[135] Cass R. Sunstein. "Congress, Constitutional Moments, and the Cost-Benefit State." *Stanford Law Review* (48) (1996) 247, 289.

[136] Morton Rosenberg. "Whatever Happened to Congressional Review of Agency Rulemaking? A Brief Overview, Assessment, and Proposal for Reform." *Administrative Law Review* (51), 1051, 1077 (citing McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," 1403-1405).

2) *Repeal of the CRA would Prevent the 117th Congress from Vetoing Numerous Trump-Era Midnight Rules*

Given the present moment, and the fact that Congress has begun proposing CRA resolutions of disapproval, another very relevant negative is that the 117th Congress would be unable to take action on numerous Trump midnight rules. The Congressional Research Service has unofficially estimated that final rules submitted to the House or Senate after August 21, 2020, until the end of the 116th Congress on January 3, 2021, are subject to the CRA lookback provisions.[137] There are by some accounts over 1,400 rules that were made in the waning months of the Trump Administration that are eligible for review under the CRA.[138] Some argue that the practical constraints of the Congressional calendar likely mean that it could only be used around a dozen or two dozen times before those expedited procedures expire."[139] Also, given the 2019 OMB memorandum, it will take away Congress's ability to reach further back in time to overturn long-standing guidance.[140]

Many of the Trump Administration's midnight rules were anti-regulatory and are perceived by Democrats in the 117th Congress as putting the environment, labor, and other Democratic values at risk. Keeping the CRA would allow the 117th Congress to summarily veto some of these Trump-era rules. Of course, this enticement must be

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[137] Congressional Research Service. "Congressional Review Act Issues for the 117th Congress: The Lookback Mechanism and Effects of Disapproval" by Maeve P. Carey and Christopher M. Davis (February 19, 2021), 6.
[138] George Washington University, Columbian College of Arts & Sciences, Regulatory Studies Center, *Congressional Review Act*, accessed April 12, 2021 https://regulatorystudies.columbian.gwu.edu/congressional-review-act; https://docs.google.com/spreadsheets/d/1eQAe8DRfZuLMSBJJKndY_NyzKDRHGi28Jym5WgRplus/edit#gid=0
[139] Goodwin. "The CRA Could be put to Positive Short-Term Use, But it Should Still be Repealed."
[140] Taking away the ability to reach back in time to veto guidance documents would reward companies if they had already invested in compliance and would not reward non-compliant companies.

measured against the risk that Senator McCain identified with regard to the Waste Reduction Rule – issuing a joint resolution of disapproval may make it problematic for agencies to issue more "desirable" rules in the future on the same subject matter.

Political Analysis

Passage of the SCRAP Act of 2021 would be a heavy lift. There are many in the Republican Party who are are committed to "regulatory reform" and persuading them that the CRA is a bad tool, would be difficult. That being said, even some whose general impulse is toward regulatory reform recognize some the CRA's shortcomings. Further, interest groups who supported the CRA when it was used to get rid of protective regulations are not happy with the prospect of it being used to undo Trump-era rules. This shows that their support for the CRA may be tied to certain applications more than the statute itself. Therefore, it may be possible to gain support among interest groups to repeal the CRA before it can be unleashed to undo the rules developed late in the Trump Administration. And, while the public "love[s] to hate bureaucracy, the reality is that executive agencies have a significantly higher approval rating than Congress."[141]

I. STAKEHOLDER POSITIONING ON THE CRA?

Many trade associations supported the CRA when it was being used by the 115th Congress to rescind Obama-era regulations. Sometimes that support extended to the CRA writ large but oftentimes the support was tied more closely to a specific proposed resolution of disapproval. Among those that supported specific applications of the CRA

[141] J. C. Rogowski. "The Administrative Presidency and Public Trust in Bureaucracy." *Journal of Political Institutions and Political Economy* 1(1) (2020), 27–51, 12, 23.

were associations including the American Chemistry Council, National Mining Association, National Association of Manufacturers, and the American Petroleum Institute.[142] However, some trade association went further to support expansions of the CRA which would have allowed either more liberal application of the CRA to older executive orders and guidance documents or bundling of the multiple rules in a single CRA regulation.[143]

Tellingly, however, the U.S. Chamber of Commerce and the National Association of Manufacturers which are well known to be very conservative are now opposing the use of the CRA by the 117th Congress.[144] Several CRA joint resolutions of disapproval have now been introduced. The Chamber and NAM have spoken out against a proposed resolution which would undo a Securities and Exchange Commission rule which investors say curbs their power to push for corporate action on issues like climate change and compensation.[145]

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[142] Jeff Johnson. "Congress considers revoking chemical safety rule: Chemical makers asked for overturn of EPA regulation." C&EN (95) (February 6, 2017), https://pubs.acs.org/doi/10.1021/cen-09506-notw12; National Mining Association, December 19, 2016, "NMA strongly opposes EPA's duplicative stream rule." https://nma.org/2016/12/19/nma-strongly-opposes-interior-departments-duplicative-stream-rule/; National Association of Manufacturers, "Let your Representative know that manufacturers need Washington to address the regulatory burden we face in order to accelerate economic growth." https://manufacturingworks.nam.org/bFKmtEd; American Petroleum Institute, "Support the Congressional Review Act Disapproval Resolution for the Dodd-Frank Section 1504 Rule." https://www.api.org/-/media/Files/News/Letters-Comments/2017/2-1-29-17_API-CRA_Dodd-Frank_1504.pdf

[143] National Association of Home Builders, January 6, 2017. "House Passes Regulatory Reform Bills." https://nahbnow.com/2017/01/house-passes-regulatory-reform-bills/; Neil Bradley, May 11, 2017. "After the Successful Use of the Congressional Review Act, Here's Where Regulatory Reform Goes Next."https://www.uschamber.com/series/above-the-fold/after-the-successful-use-the-congressional-review-act-here-s-where-regulatory.

[144] Katanga Johnson. "U.S. Senate Democrats aim to undo Trump-era shareholder voting rights rule." Reuters, March 26. 2021, https://www.reuters.com/article/us-usa-senate-proxy/u-s-senate-democrats-aim-to-undo-trump-era-shareholder-voting-rights-rule-idUSKBN2BI2BS?il=0

[145] Johnson. "U.S. Senate Democrats aim to undo Trump-era shareholder voting rights rule."

Furthermore, even some writing on behalf of the CATO Institute finds that the CRA is not the best tool to review regulations. In 2020, the CATO Institute put out a Policy Analysis stating that the CRA "deprives lawmakers of an informed choice. At present, members deliberating on a legislative veto are limited to information from biased sources—either the president behind the rule or special interests aligned on one side or the other of a given regulatory policy."[146] The analysis stated that the flurry of legislative vetoes in the 115th Congress demonstrated the inadequacy of the current process. CATO pointed out that: "No committee held a hearing, much less a vote, on any of the measures, nor did any committee issue any reports. For each of the legislative vetoes, Congress failed to perform any investigation or analysis." This objection to the CRA is remarkably on point with the position of the Center for Progressive Reform that the CRA is problematic because it eliminates deliberation.[147]

In a blog post, the Competitive Enterprise Institute (CEI) recognized that Congress has the authority to undo any regulation even without the CRA.[148] CEI questioned the legitimacy of the CRA's acting as a permanent rules change in contravention of the Senate's filibuster rule. This was argued to be problematic because the Constitution gives each House the authority to set its rules as it sees fit.[149]

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[146] Yeatman. "The Case for Congressional Regulatory Review."
[147] McGarity et al. "The CRA: The Case for Repeal," at 25.
[148] William Yeatman, "Why not a 'Nuclear Option' for Legislative Vetoes?" Competitive Enterprise Institute (May 25, 2017).
[149] Ibid.

Among environmental non-governmental organizations and left-leaning think tanks, there has similarly been opposition to specific applications of the CRA[150] but also broad condemnation of the law and calls for its repeal. Among those groups who have taken the broadest stance against the CRA, the two most vocal opponents are Public Citizen and the Center for Progressive Reform. Public Citizen has highlighted that the CRA was used in 2017 to reverse protective rulemakings and that those reversals could be tied to over $1 billion in political contributions. Public Citizen stated that the outcome is that "corporate predators, polluters and profiteers who would have been reined in by these rules are now free to abuse, exploit and discriminate against regular Americans, knowing they won't be held accountable."[151] Additionally, the Natural Resources Defense Council has characterized the CRA as "a blunt instrument with dangerous repercussions" which makes it possible for Congress to "block public safeguards on behalf of special interests, undoing rules that often reflect years of painstaking, technical work to deal with complex problems . . . ."[152]

II. PUBLIC VIEWS ON THE CRA AND THE NEED FOR REGULATORY REFORM

In trying to understand where the public stands on the CRA, it is helpful to look to the public's perception of administrative agencies or "the bureaucracy" as a proxy because no surveys have been completed specifically addressing the CRA. While some

[150] See, e.g., "GOP Launches Assault on Health Protections, Safeguards," Natural Resources Defense Council (February 1, 2017); retrieved April 9, 2021 from: https://www.nrdc.org/media/2017/170201-0; "Trump Signs Attack on Clean Water into Law," Earthjustice (February 16, 2017), accessed April 9, 2021 https://earthjustice.org/news/press/2017/trump-signs-attack-on-clean-water-into-law

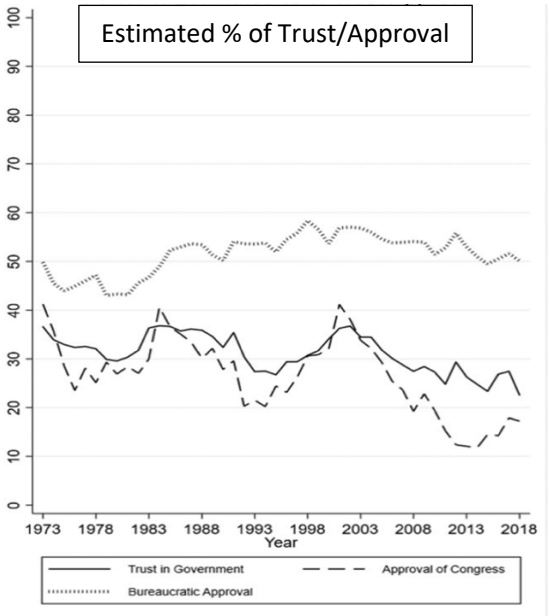
[151] "The CRA Must Go and Repealed Protections Must Be Restored," Public Citizen (May 16, 2017).

[152] "Fact Sheet: The Congressional Review Act: A Blunt Instrument," (January 2017), accessed April 9, 2021 https://www.nrdc.org/sites/default/files/congressional-review-act-fs.pdf

surveys evaluate Americans' trust in government overall and Congress in particular, there are not many surveys specifically evaluating Americans' trust in administrative agencies.[153]

However, a study that was released in January of 2021, synthesized various studies and determined that Americans approve of bureaucratic institutions at a much higher level than they do of Congress, and at a higher level than they express trust in government overall.[154] This finding is consistent with the results of a 2005 study wherein the researchers evaluated public approval for the bureaucracy at a macro-level, as opposed to their approval for individual agencies.[155]

Figure 4. Public Trust in Government



Another recent study on this topic concluded that "Americans appear poised to defer to bureaucrats on questions of policy implementation when those bureaucrats are

[153] See, e.g., Gallup, https://news.gallup.com/poll/1597/confidence-institutions.aspx; American National Election Study, https://electionstudies.org/.

[154] Louis Fucilla, "Does the Bureaucracy Affect Trust in Government? Evidence from Aggregate Public Opinion." *Social Science Quarterly*, Volume 102, Number 1, January 2021, 69-82. at 77.

[155] Fucilla, "Does the Bureaucracy Affect Trust in Government?" at 76 (citing Susan Webb Yackee and David Lowery, "Understanding Public Support for the U.S. Federal Bureaucracy: A macro politics view." *Public Management Review* (7:4) 515-536.)

perceived as experts."[156] The researcher concluded that it behooves those who support agency action to focus on agency expertise. Interestingly, this is consistent with the New Deal rationale for the expansion of the bureaucracy and the Supreme Court's rationale for granting deference to the administrative state.[157]

The idea that Americans hate the administrative state is a very popular media trope but may be untethered to reality.[158] Based on their research, Yackee and Lowery conclude: "we know now that public opinion regarding the federal bureaucracy is not nearly as low as may be inferred from the negative assessments of some politicians and political pundits."[159]

In the absence of an estimate of approval for the CRA, public trust in the agencies that are hamstrung by the CRA is a good proxy. To the extent that the public approves of the agencies more than they approve of Congress, it seems feasible that the public

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[156] Rogowski "The Administrative Presidency and Public Trust in Bureaucracy," at 25.

[157] *Kisor v. Wilkie*, 139 S. Ct. 2400, at 2417. Justice Kagan, writing for the Court, provides an extended discussion of why agencies should be granted deference including that they have "unique expertise," that they "can conduct factual investigations, . . . consult with affected parties, . . . consider how their experts have handled similar cases . . ."

[158] See e.g., Philip Wallach, "The administrative state's legitimacy crisis"; John Tierney, *The Tyranny of the Administrative State,* Wall Street Journal, June 9, 2017, https://www.wsj.com/articles/the-tyranny-of-the-administrative-state-1497037492 ; The Editorial Board, "Administrative State Under Judicial Fire," *Wall Street Journal.* September 19, 2019, https://www.wsj.com/articles/administrative-state-under-judicial-fire-11568929932; Robert Samuelson, "The administrative state is huge, and its only getting bigger," *Washington Post*. March 5, 2017, https://www.washingtonpost.com/opinions/the-administrative-state-is-huge-and-its-only-getting-bigger/2017/03/05/bb388e28-003a-11e7-99b4-9e613afeb09f_story.html.

[159] Yackee and Lowery, "Understanding Public Support for the U.S. Federal Bureaucracy," at 530.

would look favorably upon revoking a law which hands more power to Congress to undo the work of the bureaucracy.

III. Political Benefits and Costs of Pursuing the SCRAP Act of 2021

Pursuing the SCRAP Act will have associated political benefits and costs. It will serve to further align the administration with those entities who believe a fully functional administrative state will provide critical protection to Americans. It will also serve to provide unity within the Democratic party, paving the way for agencies to take what is perceived as critical action on issues such as climate change, immigration, and other issues.

However, pursuing the SCRAP Act of 2021 will provide a basis for those who supported expansion of the CRA to move further away from the Biden agenda.[160] This group is comprised almost exclusively of Republicans (plus one Democrat who lost his seat in the 2020 election), and given that to date, no Republicans have voted with the Biden Administration on any substantive matter, perhaps this political risk is small. Therefore, alienating this group may not be of significant political consequence.

The greater political risk seems to be from within the Democratic Party. While immediately after the election and prior to President Biden's inauguration, there was much hand-wringing over the fragile Democratic coalition, so far, that coalition is

[160] See e.g., The Regulations from the Executive in Need of Scrutiny Act of 2017 (REINS Act) had 160 Republican co-sponsors in the House, https://www.congress.gov/bill/115th-congress/house-bill/5/related-bills and the Midnight Rules Relief Act had thirteen Republican co-sponsors and one Democrat, Rep. Collin Peterson, who is no longer a sitting representative. https://www.congress.gov/bill/115th-congress/house-bill/21/cosponsors?searchResultViewType=expanded. Similarly, the Regulatory Accountability Act had twenty-four Republican co-sponsors and Rep. Collin Peterson. https://www.congress.gov/bill/115th-congress/house-bill/5/cosponsors?searchResultViewType=expanded.

holding together.[161] But, the focus to date has been addressing the economic and pandemic crises facing the country. There is recognition that "the moment of unity could be fragile: Sharp differences remain between Mr. Biden and his left flank over issues like health care, college costs, expanding the Supreme Court and tackling income equality. A battle looms over whether to prioritize a $15 per hour minimum wage in the administration's first piece of legislation."[162]

And, more to the issue at hand, should this administration pursue the SCRAP Act, it would do so despite the fact that at present, several resolutions have been introduced under the CRA to dismantle Trump-era rules and more are planned.[163] Further, one of these resolutions has over twenty-five Democratic co-sponsors in the House.[164] Additionally, more CRA joint resolutions of disapproval are being planned.[165] One means to address this political risk would be to wait to seek reintroduction of the SCRAP Act until after the CRA lookback period has run. However, the flip side of this tactic would be

[161] Lisa Lerer and Reid J. Epstein, "How Biden United a Fractious Party Under One Tent," New York Times. (March 3, 2021), https://www.nytimes.com/2021/02/09/us/politics/joe-biden-democratic-party.html
[162] Ibid.
[163] S.J.Res.16 - A joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Securities and Exchange Commission relating to "Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8". https://www.congress.gov/bill/117th-congress/senate-joint-resolution/16/text H.J.Res.37 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Department of Health and Human Services relating to "Securing Updated and Necessary Statutory Evaluations Timely". https://www.congress.gov/bill/117th-congress/house-joint-resolution/37/cosponsors?r=2&s=2.
[164] H.J.Res.34 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of a rule submitted by the Environmental Protection Agency relating to "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review". https://www.congress.gov/bill/117th-congress/house-joint-resolution/34/text?r=5&s=1.
[165] "The Senate will take up a Congressional Review Act measure to reinstate the commonsense regulation of methane emissions to fight climate change." Congressional Record Vol 167: 56 March 25, 2021 S1792.

that any support that could be sought from the Chamber or the National Association of Manufacturers will be gone at the same moment.

IV. Political Strategies to Employ in Pursuit of the SCRAP Act of 2021

Given that the Democratic coalition is strong at present and is likely to remain so for the next several months, it seems prudent to pursue the SCRAP Act of 2021 right away in order to take advantage of any possible willingness on the part of entities such as the US Chamber of Commerce and the National Association of Manufacturers to help push some willing Republicans to support the SCRAP Act. It would be necessary to get a handful of Republicans on board to pass this bill in the Senate. Furthermore, the administration should highlight the expertise in agencies and public support for those agencies and leverage that support for agencies over Congress to help form a coalition of willing Republicans to join Democrats in support of the SCRAP Act of 2021.

Recommendation

In light of the above analysis, I strongly recommend pursuing the SCRAP Act of 2021. While there is a possibility that it will not pass the Senate, the political downside risks associated with pursuing the bill are not sufficient to override the potential policy benefits of passage of the bill.

Pursuing the SCRAP Act of 2021 has two potential political risks. The first political risk comes from the Biden Administration's political right. Seeking to repeal the CRA will likely further alienate Republicans who sought to make the CRA stronger and who strongly favor Congressional oversight of administrative agencies. These same Republicans could paint a picture of Biden and Congressional Democrats who support

the SCRAP Act as allowing "the administrative state" to run roughshod over business, the American people, and Congress.[166] This is one more reason to act quickly. If the effort takes place in 2021, it is less likely to be used to attack Congressional Democrats running for reelection in 2022.

The other political risk comes from the Administration's left within the Democratic Party. While the Democratic Party has attained some level of coherence at present, it is recognized that there are many areas of disagreement on issues such as health care, college costs, the number of Justices that should sit on the Supreme Court, income equality, and the minimum wage. Given this background and the fact that there are numerous proposed resolutions of disapproval that have been tabled by Democrats, taking action to dismantle the CRA could disturb the current fragile peace that exists within the Democratic Party. However, most Democrats will realize that the CRA is an anti-safeguard and anti-regulatory law which has been wielded effectively to dismantle protective rules.

Despite these political risks associated with seeking passage of the SCRAP Act, the policy imperatives associated with repealing the CRA make pursuing the SCRAP Act the best course of action. First, the CRA is an anti-safeguard law – in looking at every rule which has been vetoed under the CRA to date, each has protections such as internet privacy, gun control, biodiversity, water quality, women's health, workplace safety, fair

[166] K. Sabeel Rahman, "Book Review: Reconstructing the Administrative State in an Era of Economic and Democratic Crisis." *Harvard Law Review* (131: 671) (April 10, 2018), 1671-1712, 1690 (citing Jon D. Michael. *Constitutional Coup: Privatization's Threat to the American Republic*, Cambridge, MA: Harvard University Press 2017 (p. 169-170)). C.J. Atkins. "Why does Steve Bannon want to destroy the 'administrative state'?," People's World (February 24, 2017), accessed April 16, 2021 https://www.peoplesworld.org/article/steve-bannon-rolls-out-his-far-right-nationalist-agenda/.

pay measures, and retirement security. The CRA is a tool which has only been used by Presidents with an anti-regulatory and anti-safeguard agenda.

Second, repealing the CRA will make it more straightforward for agencies to act. This is important given the absence of critical legislation to address the most pressing issues of the day. Hyper-partisan gridlock in Washington has created a situation where Congress has utterly failed to legislate on the most challenging issues. Even in cases where Congress has legislated, it has left significant gaps for agencies to interpret and implement. By making it more difficult for agencies to act with certainty, the CRA has made it just that much more challenging to have any action on pressing issues of the day.

Third, the CRA creates obstacles to agencies being able to act efficiently. It slows down the process of notice-and-comment rulemaking and sets the stage for agencies to spend years working on a rule only to have all of that work jettisoned. Agencies may make judgements that in order to avoid falling within the CRA lookback period, that they should rush through the process which can result in poorly researched and designed regulations.

Fourth, the fact that CRA, by design, limits deliberation and that resolutions of disapproval occur with little to no deliberation creates an appearance of impropriety. This structural problem has been recognized by commentators on both the political left and right. This very rapid decision-making to rescind a regulation that may have been in the works for years erodes the public's trust in government. The argument that the use

of the CRA to veto certain rules amounts to nothing more than a political decision that may be driven by contributions harms our government's institutional credibility.

Fifth, the expansive interpretation of the CRA in the OMB 2019 memorandum creates significant uncertainties. It has been argued by some conservative scholars, that OMB's memorandum may mean that any and all guidance documents created since 1996 which were not submitted to Congress may all be invalid. In the last twenty-five years, industry has taken these guidance documents as *de facto* law and has acted in accordance with them. While there is certainly room to argue that this is not the ideal way to make law, OMB's interpretation of the CRA has the potential to cost companies that installed additional controls or changed practices in order to comply very significant sums of money. It creates an incentive for noncompliance. These are not objectives that Congress should want to encourage.

Finally, the CRA's limitation on substantially similar rules creates real issues in terms of the ability to develop new regulations that cover the same subject matters as regulations that have previously been vetoed through the use of the CRA. The substantially similar provision may mean that because Congress refuses to act and the agencies are unable to act, that there is no recourse to address pressing issues.

By repealing the CRA, all of these problems that are created by its application would go away. And, repealing the CRA would not make it impossible for future Congresses and administrations to get rid of existing regulations that they deem inappropriate. Congress can change the law and it has the power of the purse. Further executive agencies can unwind existing rules under the standard APA process.

In sum, while there are political risks associated with repealing the CRA, and while it is possible that the Administration will not be able to muster the votes to pass the SCRAP Act, the possibility of removing the CRA from the arsenal of anti-safeguard politicians is sufficiently important to pursue passage of the SCRAP Act.

CURRICULUM VITAE

Melissa Barbanell is a highly accomplished attorney and thought leader with over twenty years' experience. Her key areas of expertise include environmental law and policy, sustainability, regulatory and legislative affairs, and strategic engagement. Her subject matter expertise includes air quality and air toxics, climate and energy law, public lands and natural resources management, water stewardship, and biodiversity. Melissa has worked on critical matters at the state, national, and international levels, engaging with high-level government officials as well as business executives, NGOs, and intergovernmental agencies.

Melissa is President of Barbanell Environmental Law and Consulting where her primary focus is on environmental regulatory tracking, government relations support, and policy development. She is currently representing the global non-ferrous metals and mining sector, serving on two United Nation's Environment Programme Expert Panels implementing the Minamata Convention on Mercury. Previously, Melissa worked for Barrick Gold Corporation in a variety of roles for more than 12 years. Most recently, she was Senior Director, Corporate Affairs. She represented the company working on complex policy issues and developing sound standards for the mining industry.

Melissa currently serves on the Board of Directors for PG Retreat where she chairs the Legal and Policy Committees. She previously served on the Board of Friends of Great Salt Lake, where she chaired the Committee on the U.S. Magnesium Superfund site. Melissa's Board experience also includes Splore, the Nevada Mining Association, and the American Exploration and Mining Association, where she chaired the Environmental

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Melissa is excited to be completing her Masters in Public Management at Johns Hopkins University. Additionally, she holds a J.D. from the University of Utah S.J. Quinney College of Law, an M.A. in Philosophy from University of Utah, and a B.A. in Philosophy from Tulane University.